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**IN THE  
COURT OF APPEALS OF INDIANA**

DAVID NAIL,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0602-CR-51

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Jr., Judge  
Cause No. 02D04-0508-FC-159

**SEPTEMBER 19, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBERTSON, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant David Nail was convicted by a jury of the Class C felony of stalking. It should be noted that Nail represented himself at trial, although he had a stand-by attorney available. He was sentenced to eight years with two of the eight years suspended.

We affirm.

## ISSUES

Nail states the issues as:

1. Whether the trial court committed fundamental error in its jury instruction on the elements of the crime of stalking.
2. Whether the evidence was sufficient to support conviction.

## FACTS

Because Nail is questioning the sufficiency of the evidence, we look at the evidence that supports the jury verdict. Nail and his wife, Pamela, were married for almost fourteen years; however, the relationship deteriorated because of Nail's drinking problem. Nail was charged and convicted of battering Pamela. His probation included a no contact order that was supposed to keep Nail from having any contact with Pamela. Pamela later obtained a protective order that prohibited Nail from committing acts of family or domestic violence, stalking, or a sex offense. The protective order also prohibited Nail from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with Pamela.

Pamela contacted an attorney in January of 2005, and filed for divorce. Between January, 2005, and March, 2005, Nail called Pamela approximately 300 to 350 times, and

in addition sent faxes and letters to Pamela's workplace. Pamela turned off the ringer on her telephone and started to tape record the messages that Nail left on her answering machine. In one week Nail called over a hundred times and made accusations that Pamela and her father, who had leukemia, had an incestuous relationship, that Pamela was having an affair, and that she was a liar, slut, and a whore. Nail also accused Pamela of being a coward because she refused to talk to him.

On 20 April 2005, Nail left a message on Pamela's answering machine that he was going to kill her. Fearing for her life, Pamela called the police and her attorney. These messages from 20 and 21 April were played for the jury. Pamela spent the night at her attorney's home. When she went to work the next day, she found a message from Nail that he was going to kill her that night. Feeling ill because of the messages, she left work and went home. Nail had left yet another message on her phone, and Pamela called the police again and packed her clothes so she could move in with her parents.

When Pamela returned to her home the following week, she placed bells on the doors and windows to serve as a warning should Nail attempt to enter. She asked friends and neighbors to check with her each day to make sure that she was all right. Eventually, she moved to another address, but her former landlord brought her a letter that Nail had sent to her at her former address. Nail also sent a fax to Pamela at her job.

Additional facts will be disclosed as needed.

## DISCUSSION AND DECISION

### The Instruction

We begin the discussion of this issue by noting that the instruction, which Nail now complains of, was not the subject of a contemporaneous objection, nor did Nail tender an instruction on the same matter. As a general rule, failure to object at trial results as a waiver of an issue for purposes of appeal. *Washington v. State*, 840 N.E. 2d 873, 886 (Ind. Ct. App. 2006), *trans. denied*. In avoidance of the foregoing rule, Nail labels the error in giving the instruction as fundamental.

Fundamental error is error that represents a blatant violation of basic principles rendering the trial unfair to the defendant and thereby depriving the defendant of fundamental due process. The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial. The element of harm is not shown by the fact that a defendant was ultimately convicted. Rather, it depends upon whether the defendant's right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled. In determining whether fundamental error occurred in the giving of instructions, we consider all the relevant information provided to the jury including that in closing arguments and other instructions. There is no due process violations where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law.

*Davis v. State*, 835 N.E.2d 1102, 1107-8 (Ind. Ct. App. 2005), *trans. denied*. (Citations omitted.)

The instruction that Nail now complains of, is based upon Ind. Code § 35-45-10-5)(b) and sets forth the conditions to be met in order to elevate criminal stalking from a Class D felony to a Class C felony. Nail says the jury was not instructed about the

elements of stalking. The essence of this issue is whether stalking can be committed by only telephone calls.

In *Smith v. State*, 802 N.E.2d 948, (Ind. Ct. App. 2004), this court held that telephone calls without more, may amount to impermissible contact sufficient to support a stalking conviction. *Id.* at 954. In reaching that conclusion the court on appeal discussed impermissible contact<sup>1</sup>, and harassment<sup>2</sup>, as they applied to a conviction for stalking. Nail's argument repeats, for the most part, the argument made in *Smith*.

In pertinent part the jury was correctly instructed:

The crime of stalking is defined by statute as follows:  
A person who stalks a victim and makes an explicit or implicit threat with the intent to place the victim in reasonable fear of sexual battery (as defined in I.C. 35-43-4-8), serious bodily injury, or death, and/or an ex-parte order for protection under I.C. 34-26-5 that has been issued by the court to protect the same victim from the person and the person has been given actual notice of the order, and/or the person's stalking of another person violates a no contact order issued as a condition of probation if the person has been given actual notice of the order, commits Stalking, a Class C felony.  
Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant, David Nail,
2. Stalked Pamela Nail and
3. (a) did make an explicit and/or implicit threat with the intent to place Pamela Nail in reasonable fear of sexual battery, serious bodily injury, or death and/or  
(b) an ex-parte order for protection under I.C. 34-26-5 that has been issued by the court to protect Pamela Nail from the Defendant when Defendant has been given actual notice of the order and/or

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<sup>1</sup> Impermissible contact includes, but is not limited to knowingly or intentionally following or pursuing a victim. I.C. 35-45-10-3.

<sup>2</sup> Harassment means conduct directed towards a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. I.C. 35-45-10-2.

(c) violated a no contact order issued as a condition of probation when the Defendant had been given actual notice of the order.

If the State failed to prove each of the elements beyond a reasonable doubt, you must find the defendant not guilty.

If the State did prove all of these elements beyond a reasonable doubt, you may find the Defendant guilty of Stalking, a Class C felony.

The instruction properly informs the jury of those elements, which the State must prove beyond a reasonable doubt in order to secure a conviction. Under the foregoing standard of review in determining whether this issue is fundamental error, we are of the opinion that all of the relevant information, when considered as whole, does not mislead the jury as to a correct understanding of the law. There is no error here, fundamental or otherwise.

#### Sufficiency of the Evidence

Nail's sufficiency of the evidence argument is contingent upon our finding that his conduct did not amount to stalking. Obviously, we have found that his actions did amount to stalking; accordingly, the evidence is sufficient.

#### CONCLUSION

Nail's conduct amounted to stalking, and the evidence is sufficient to sustain the conviction.

Judgment affirmed.

MAY, J., and BARNES, J., concur.